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Congress of the United States
House of Representatives

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Committees:

FOREIGN AFFAIRS

Chairman, Subcommittee on
Europe, Eurasia, and Emerging Threats
Subcommittee on Asia and the Pacific

SCIENCE, SPACE, AND TECHNOLOGY

Subcommittee on Space
Subcommittee on Energy
Subcommittee on Environment

The Honorable Andrei Iancu
Under Secretary of Commerce for Intellectual Property and
Director of the U.S. Patent and Trademark Office
600 Dulany Street
Alexandria, VA 22314

Dear Director Iancu:

I thank you for your actions since taking on the leadership of the USPTO and for your assurance that protecting the intellectual property rights of our inventors is a top priority. We are counting on you to reestablish, under your watch, accountability and transparency that are prerequisites to an effective and fair patent system.

We are sadly aware that transparency and accountability were not always part of the PTO game plan. I bring this up not to dwell on the past but to recognize the long-term repercussions of wrongheaded methods and procedures in previous administrations. Unfortunately, the resulting damage of such rogue policies still takes its toll on affected inventors even today.

One of the primary guidelines of our American patent system is that the PTO should not favor one industry over another; should not favor entrenched market incumbents and large entity patent applicants over small entities and individual or pro se inventors. Unfortunately, that is what the PTO was doing for more than two decades under the secret program called Sensitive Application Warning System ("SAWS"). Despite the official retirement of the SAWS program in 2015, its adverse effects still linger today with disproportionate irreversible harm to small entities and individual inventors.

To understand what happened and put the PTO back on a correct course there is a need to know exactly how many patent applications were so flagged and thus sidelined over the life of the SAWS operations. It appears that 2,262 patent applications were flagged since 2009, the first year they were put in a database. This is a stunning number, but it also fails to include flagged patents over the first 25 years of the program. Apparently, tens of thousands of patent applications were locked into this secret shadow world in which patent applications could never see the light of day even though they clearly met patentability standards.

With a new direction at the helm it is time for an accounting and a repudiation of this secret suppression of patent rights. The PTO file history for each patent application serves as the official record of the application. Of course, because it was secret the SAWS designation never appeared in the file histories. So in the files every document has been removed that

indicates the application had been flagged under SAWS. This injustice needs to be corrected not ignored. If a fair and legal standard is to be established by the PTO this crucial information must be placed in the written record and made available to the applicant. That is what transparency and accountability are all about.

Although the SAWS program was officially retired in 2015, many of the applications flagged under SAWS are still pending and it is unclear why that should be the case. This has led to concern that the PTO may still be operating SAWS-like programs to the present day, and phrases such as “on hold” and “second pair of eyes” indicate an ongoing process that may sometimes even be hidden from the official channels. Hopefully, under your leadership this situation will be addressed, and their fears laid to rest.

It is a travesty that many thousands of patent applications were flagged, thus delayed, under SAWS, and that the waiting patent applicants gave up or even died without ever knowing what was causing the delay of their patent applications. To add insult to injury, some of your predecessors at the PTO blamed patent applicants when they knew all along it was the PTO’s fault. The years of “unreasonable and unexplainable delay” inventors were blamed for was the result of a SAWS flag placed on their application.

I recommend that you rectify the errors of the PTO’s previous administrations by ordering the retrieval and placement of the complete SAWS materials into the file histories of the relevant patent applications. Consistent with this, the affected patent applicants should be notified of the availability of such materials. This is the right thing to do and will serve the PTO well as you bring the office back to real professionalism. Please keep me informed as to this recommendation.

Yours sincerely,

A handwritten signature in blue ink that reads "Dana Rohrabacher". The signature is fluid and cursive, with the first name "Dana" and last name "Rohrabacher" clearly legible.

Dana Rohrabacher
Member of Congress